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STATEMENT OF THE CASE.

The indictment contained two counts.

The first charged a conspiracy between the defendants Stilson and Sukys, together with two persons named Vididas and Stalioraitas, to violate section 3 of the so-called espionage act by causing insurbordination and obstructing recruiting in the military forces of the United States by the publication of a certain leaflet in the Lithuanian language entitled "Let us not go to the Army," and other leaflets dealing with the draft, and also by publishing certain articles and editorials in "The Kova," a socialist newspaper in the Lithuanian language. A number of these publications were set out as overt acts. (Rec. 4–23.)

The second count (Rec. 24) charged a conspiracy by the same persons to abet, induce, and procure certain members of the Lithuanian Socialist Federation, who should become subject to the military law of the United States under the selective-draft act, to desert the service of the United States in time of war. As overt acts the indictment charged the publication of certain articles in "The Kova" dealing with the draft and the articles and leaflets charged under the first count.

It would seem from the record (Rec. 24, 233) that both the pleader and the trial court were of the opinion that the second count charged a conspiracy to violate section 5 of the selective-draft act, 40 Stat. 80; but that section does not punish desertion, nor indeed does any other Federal statute dealing

with the civil courts, the offense being a military one. Section 42, Criminal Code, covers the offense of enticing a soldier to desert, but the second count does not charge such an offense with sufficient precision and the evidence at the trial was not directed to such a charge. The Government, therefore, will not press the second count but will confine the argument to the first. The sentences (Rec. 236) being less than the maximum permitted under the first count, if the conviction on that be proper, the judgment must be affirmed.

No demurrers were filed, the defendants pleaded not guilty, and after a full and noticeably impartial trial they were convicted. A motion in arrest of judgment was overruled (Rec. 230–235), and they were sentenced, Stilson to three years and Sukys to three months (Rec. 236). To these judgments the present writs of error were sued out.

ASSIGNMENTS OF ERROR.

The assignments of error (Rec. 240–258) number 25.

In so far as those assignments are concerned which raise the point of the constitutionality of the Espionage Act, numbers 2 (overruling motion in arrest of judgment), 7 (overruling motion for verdict), 21 (charge of court as to freedom of the press), 25 (similar to 7), this Court having since decided that the point is not well taken, these assignments must be disregarded except in so far as assignments 2 and 7 raise other questions.

Assignments 2 (motion in arrest), 3, 5, and 6 raise the question of the right of each defendant, where several are indicted for a conspiracy, to the full number of peremptory challenges provided for in section 287, Judicial Code.

Assignment 4 relates to the overruling of a challenge for cause. It is so wholly without merit that it will not be further noticed in this brief.

Assignments 2 (motion in arrest), 10, 11, 12, and 20 relate to the use in evidence of certain papers seized under a search warrant.

Assignments 2 (motion in arrest), 8, 9, 17, and 19 relate to testimony of statements made by the defendant Stilson after he had been placed under arrest.

Assignments 1 and 24 relate to the overruling of a motion for a new trial. As such action can not be assigned as error under the Federal practice, these assignments will not be further noticed in this brief.

Assignment 16 relates to the exclusion of evidence offered on behalf of the defendant Sukys that former charges against him for the same offense either had not been pressed or had been ignored by the grand jury.

All the other assignments bear upon the general question, viz, whether the defendants were properly convicted or not, in connection, partly, with the charge to the jury by the trial court.

ARGUMENT.

I.

Assignments of Error 2, 3, 5, and 6.

Defendants jointly indicted for a conspiracy are not entitled to several peremptory challenges to the full number authorized by law, nor was there abuse of discretion in denying a severance.

(*a*) The grant of separate trials to defendants is a matter of discretion, and the exercise of such discretion will not be reviewed on writ of error. *United States* v. *Ball*, 163 U. S. 672; *Sparf* v. *United States*, 156 U. S. 51; *United States* v. *Marchant*, 12 Wheat. 480.

(*b*) It would seem that at the common law joint defendants had the right to challenge separately to the full number allowed by law. *United States* v. *Marchant*, 12 Wheat. 480, 481.

(*c*) The rule was changed by the act of June 8, 1872, 17 Stat. 282, amending in this respect section 2 of the act of March 3, 1865, 13 Stat. 500 (Rev. Stat. sec. 819, Jud. Code sec. 287), and providing that—

> "in all cases where there are several defendants, the parties shall be deemed a single party for the purposes of all challenges under this section."

The statute is unambiguous, and has uniformly been construed to cover cases of joint indictments or indictments of several for a conspiracy. *United States* v. *Hall*, 44 Fed. 883; *Emanuel* v. *United States*, 196 Fed. 317, 320, 321; *Kettenbach* v. *United States*, 202 Fed. 377, 382; *Schwartzberg* v. *United*

States, 241 Fed. 348, 351. See also *Mutual Life Insurance Company* v. *Hillmon*, 145 U. S. 285, 293. In the case of *Schwartzberg* v. *United States*, *supra*, the court used the following language:

> "The present Federal statute (in the respect under consideration) is much older than the Judicial Code, having passed from a statute of 1865 into section 819, Rev. St. (Comp. St. 1916, sec. 1264). *United States* v. *Hall* (C. C.) 44 Fed. 883, 10 L. R. A. 323. It certainly enlarged the common law, in that peremptory challenges were given in civil causes (*Stone* v. *Segur*, 11 Allen (Mass.) 568), and removed that doubt in respect of criminal trials not involving capital punishment, reflected in the older writers, and many cases (Blackstone, Bk. 4, p. 353; *Gray* v. *Reg.*, 11 Cl. and F. 427; *United States* v. *Shackleford*, 18 How. 588, 15 L. Ed. 495). But it did not change nor seek to alter the accepted method of interpreting the word 'party,' nor the rights of several defendants to the same indictment. Such defendants have always been regarded as one party, there is a legal obligation on them so to act, and the law (absente any statutory change) insists on so treating them. The very decisions relied on by these plaintiffs in error sustain this historical position. *State* v. *Cady*, *supra*; *People* v. *McCalla*, 8 Cal. 301; *People* v. *O'Laughlin*, 3 Utah, 133, 1 Pac. 653; *Cochran* v. *United States*, 14 Okl. 108, 76 Pac. 672; *State* v. *Jacobs*, 106 N. C. 695, 10 S. E. 1031. And see, generally, Thompson and M. on Juries, p. 299 et seq.

"It results that the contention becomes this, viz., that a body of defendants (in civil or criminal causes), or any one of them, may, by refusing to act in the manner prescribed by statute and imposed by historic interpretation, render any peremptory challenge impossible, or the exercise of the right by others illegal. Whether in this case the trial judge would have been justified in treating defendants' refusal to act jointly as a surrender or waiver of all peremptory challenges need not be considered; he chose the gentler method of exceeding the statutory limit, and, in favor of the accused, granted to each in severalty a reasonable share of the right they had jointly declined.

"This was a proper exercise of discretion, furnishing no ground for complaint, fundamentally because (as above stated) challenge is but the right to reject up to the legal limit, and such right does not inhere in any particular one of a plurality of either plaintiff's or defendants, but in the defendant or plaintiff party considered as a unit. When that party refused to act as a party, it was not error to save the right by discretionary subdivision."

(*d*) The statute is of course constitutional, since the Constitution merely gives the defendant the right to trial by an impartial jury. It does not stereotype the number of peremptory challenges. In *United States* v. *Shackleford*, 18 How. 588, it is recognized that the matter of peremptory challenges is governed by municipal law, and in *United States* v. *Hall*, *supra*, it is specifically held by Judge Speer that section 819, R. S., is constitutional.

The only reason advanced by the plaintiffs in error for the claim that the statute is unconstitutional is that it discriminates against joint defendants to such an extent as to deny them due process of law. This would only be the case, however, if the placing of joint offenders in a class separate from single offenders was grossly arbitrary and unreasonable, which, of course, it is not. On the contrary, the classification is eminently sensible. In the first place the defendants make the class themselves by their voluntary action. They determine whether their action shall be joint or several. In the second place, a joint offense is by its very nature a more serious matter to the State than a several offense. In the third place, to allow each one of many joint defendants as many peremptory challenges as he would be entitled to if tried separately would be to embarrass the due prosecution of joint offenders to the extent of a *reductio ad absurdum*. Thirty joint defendants each claiming a right to challenge peremptorily ten of the jury panel would bring the administration of criminal justice into contempt. That a regulation by the legislature of the matter of challenges does not deny due process of law, or deny privileges and immunities, or improperly discriminate, has been decided by this court in the following cases: *Hayes* v. *Missouri*, 120 U. S. 68, 71; *Brown* v. *New Jersey*, 175 U. S. 172, 176; *Gardner* v. *Michigan*, 199 U. S. 325, 333; *Lang* v. *New Jersey*, 209 U. S. 467, 472; *Shevlin-Carpenter Company* v. *Minnesota*, 218 U. S. 57, 69.

The above conclusion seems to be admitted by plaintiffs in error in their brief at pages 7 and 8, but it is contended that the result is prejudicial to a particular defendant desiring to challenge where his codefendant does not. On principle the claim seems to be answered by Judge Story in *United States* v. *Merchant, supra*, viz., that the right of challenge is not a right to select the jury but merely to exclude *personae non gratae* from it. As a matter of practice, if indeed the question ever really becomes serious as such a matter, the procedure adopted by the lower court and approved by the Court of Appeals in *Schwartzberg* v. *United States, supra*, seems to point a way out of the difficulty.

II.

Assignments of Error 2, 10, 11, 12, and 20.

A warrant of search and seizure, presumably under Title XI of the Espionage Act, was executed at the place of business where "The Kova" and certain other papers and pamphlets were issued under the direction of the Lithuanian Socialist Federation, of which the defendants were officers. Certain issues of "The Kova" and of pamphlets were seized, and some of them were offered in evidence at the trial. No objection was ever made to this seizure until that upon which the present assignment of error is made. The point is, therefore, entirely governed by the decision of this court in *Schenck* v. *United States*, 249 U. S. 47, 50.

III.

Assignments of Error 2, 8, 9, 17, and 19.
There was no error committed in receiving testimony of Stilson's admissions made after his arrest.

This whole subject is gone into so thoroughly and with such due appreciation of the balancing considerations on both sides by the present Chief Justice in *Bram* v. *United States*, 168 U. S. 532, that there is practically nothing further to be said. In the case at bar there was not a particle of pressure, let alone duress, used upon Stilson to compel him to say anything, nor were any inducements, direct, indirect, or of any other character offered him in any way. Therefore, the only point which his counsel can urge is that the police officer did not warn the defendant under arrest that anything he might say would be used against him. The common law, while it has gone a long way in favor of the person charged with crime, has never gone so far as to hold, as a matter of law, that the State must urge the alleged offender not to confess. As a matter of fact, there is no more satisfactory proof to the human mind of the commission of a crime than the confession of a person that he committed it. In spite of cases where such confessions, it is claimed, have been false, common sense declares that a man will not, under any conditions existing in the last two hundred years, confess himself guilty of a crime which he did not commit. Looking at the present record fairly, with every desire to protect the just rights of the defendant, nothing appears resembling in the least star chamber

proceedings or those disapproved by this court in *Bram* v. *United States, supra*. As to the failure to warn Stilson that he was under arrest and that any statement made by him would be used against him, the point is ruled adversely to plaintiff in error in *Bram's Case* at pages 557, 558. The same ruling was made in *Powers' Case*, 223 U. S. 303, 313, relying on *Wilson's Case*, 162 U. S. 613.

IV.

Assignment of Error 16.

The evidence as to an alleged previous refusal to arrest or prosecute Skys was rightly excluded.

Such testimony was irrevelant to the issue before the jury. That issue was whether or not Sukys was guilty of a violation of law, on the evidence presented at that trial; not whether the prosecuting officers or the grand jury had thought him guilty or innocent at some previous time on the evidence then before them.

V.

Other Assignments of Error.

There was substantial evidence to go to the jury of the guilt of both of the defendants under count 1, and the case was fairly submitted to them by the trial judge.

(*a*) It is admitted that the publications complained of in count 1 of the indictment and at the trial emanated from the place of business organized and conducted by the Lithuanian Socialist Federation at 229 North Sixth Street, Philadelphia. The arrangement of this place of business is described on pages 114 to 116 of the record. The Lithuanian Socialist

Federation was, like other Socialist organizations, and like the national organization to which it belonged (Rec. 122, 133), opposed to the entry of the United States into the war or its continuance therein. It is admitted that there was not and is not now any legal objection to such an attitude, in and of itself. It is necesssary, however, to understand the conditions under which the publications complained of were made, and an important element in such an understanding is the general attitude of the Lithuanian Socialist Federation to which the defendants belonged. It is a matter of history that the National Socialist Party, at its convention in St. Louis split into two parts, each of which published its views and that this split was precisely at the point of the attitude of the party toward the war, the conservative or right wing refusing to oppose the Government in the war, while continuing to condemn war in general, and the left or radical wing advocating mass or direct action; that is, actual opposition to the Government in the execution of its war measures with the hope of a proletarian revolution. The point is brought out with sufficient clearness by Government exhibit 26, Rec. 203, which was signed by the defendant Stilson and published in "Kova." All of the publications set out in count 1 and offered in evidence at the trial show that the Lithuanian Socialist Federation belonged to the left or radical wing.

The connection of the defendants and of the other persons mentioned in count one with the

Lithuanian Socialist Federation was as follows: Stilson was the secretary of the federation, elected by vote of its members. (Rec. 68, 69, 122, 123, 140.) It is true that the word "translator" was attached to his title, and that some point was perhaps attempted to be made of this. The function of translator was, however, purely subsidiary, and arose from the necessity of translating communications from and to the National Socialist Party. His essential duties, however, were clearly those of a secretary, and he himself so describes them. (Rec. 122.) His office was at the place from which these pamphlets were issued, and at which "Kova" and other papers (Rec. 140, 141) were published. He was clearly a person exercising high authority there.

The defendant Sukys was manager of this business so carried on by the federation. His name was carried as such on the issues of "Kova" (Rec. 120), and his own testimony (Rec. 150, 151, 157, 158) shows that he performed the usual functions of a business manager. In addition he had been a correspondent of "Kova" before he became business manager (Rec. 155, 158), and, what is of more importance, he was a member of the executive committee of the federation during the time he was business manager. Some confusion as to this may be caused by what appears at Record, 160, until it is understood that he was business manager *de facto* before he became such *de jure*. (Rec. 155.)

The other persons mentioned in the indictment, namely, Vididas and Stalioraitas, were respectively

editor and assistant editor of "Kova," the former elected by vote of the members (Rec. 71, 72) and the latter appointed by the literary committee. (Rec. 67.) While it is of no particular importance, it should be explained, perhaps, that these two persons, while sought for by the Government, have never been apprehended. (Rec. 85.) There is nothing to show that the defendants have been prejudiced thereby. Indeed, it might be claimed that they have benefited, since there is no attempt to deny that the publications complained of were in fact prepared, printed, and issued by somebody connected with the business of the Lithuanian Socialist Federation in Philadelphia, and the absence of the editor and assistant editor enables the defendants to cast the responsibility upon them.

The two defendants had their offices at 229 North Sixth Street in practically the same room with the editor and assistant editor of Kova (Rec. 115, 116), and spent practically all their working time there (Rec. 129, 151), Stilson having the desk at which was located the typewriter (Rec. 115). Other papers were published at this place beside Kova (Rec. 140, 141), with which Stilson and Sukys were connected, but with which the editors of Kova were not connected. In addition the pamphlets or leaflets complained of under count 1 were printed at and issued from the same place, but had no connection with Kova. There was evidence connecting Stilson directly with Exhibit 1, "Let us not go to the Army," in that it was made by mimeographing from

a typewriter through the medium of a stencil. There was a typewriter, mimeograph, and stencil in the Kova office, and an expert testified not only that Exhibit 1 was made by this particular typewriter, in connection with the last-named articles, but that it was made from the same typewriter as a production of Stilson (Rec. 99–114). Stilson used these instrumentalities for the production of writings (Rec. 74, 76, 141, 142), such as Exhibit 24 (Rec. 199), and produced the same by cutting stencils on this typewriter (Rec. 141), and, while there was evidence that other persons used the typewriter, there was no claim that anyone else used the stencil or mimeograph. Stilson told the witness, McHenry, that no one used the typewriter but him (Stilson) (Rec. 83–88). Sukys paid for the supplies used in these various pamphlets and newspapers and for the printing of them (Rec. 157, 161). Stilson's admitted productions related to the same subject matter as Exhibit 1 (Rec. 185, 199, 207). The same sentiments expressed in Exhibit 1 are expressed in part in Exhibit 26, which is admittedly the production of Stilson (Rec. 145, 146, 185, 207).

There can, therefore, be no doubt that the jury was justified in finding Stilson and Sukys guilty of a conspiracy to publish the papers emanating from the Kova place of business, and that some of the conspirators, to further the object of the conspiracy, did the overt acts set out in count 1.

(*b*) As to whether there was evidence to go to the jury that these publications, under all the surround-

ing circumstances, obstructed recruiting or caused insubordination, or were an attempt to do either, it would be a waste of time to argue at length. They do not differ from those held sufficient for conviction in the cases of Schenck, Frohwerk, and Debs. Indeed, they seem to go somewhat further, for they seem clearly enough, for all practical purposes, to advise direct resistance to the requirements of the selective-draft act. Recruiting was then being carried on in that vicinity for the military and naval forces (Rec. 70), and Buragas, who received one of the circulars, was a soldier in the Army of the United States (Rec. 76–79).

(*c*) The above is deemed sufficient as to those assignments, viz, 7, 10, 11, 12, 14, 19, 22, and 23, which are in substance based on the claim that there was a failure of proof as to defendants' connection with the conspiracy.

As to the charge of the court, and especially as to assignment 18, dealing with that part of it telling the jury that they could call upon their general knowledge and information as to those matters which are generally known, the whole charge was noticeably fair to the defendants, and they could have taken no prejudice from what was said. Without admitting that there was anything in the least erroneous in the charge, it is certain that the jury would have called upon their own general knowledge of the world, and that this knowledge would have had a considerable effect in determining whether the publications

complained of obstructed recruiting or caused insubordination, whatever the court might have charged them upon the subject.

That a trial jury may take notice of matters of general knowledge is held by this court in *Head* v. *Hargrave*, 105 U. S. 45, 49, where it is said:

> While they (the jury) can not act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry.

In *Commonwealth* v. *Peckham*, 2 Gray, 514, it was held that a jury could find gin intoxicating without any evidence on the subject. Metcalfe, J., delivering the opinion of the court, said:

> Now everybody who knows what gin is, knows not only that it is a liquor, but also that it is intoxicating. And it might as well have been objected that the jury could not find that gin was a liquor without evidence that it was not a solid substance, as that they could not find that it was intoxicating without testimony to show it to be so. No jury can be supposed to be so ignorant as not to know what gin is. Proof, therefore, that the defendant sold gin is proof that he sold intoxicating liquor. If what he sold was not intoxicating liquor, it was not gin.

In *Hoare* v. *Silverlock*, 12 Q. B. 624, the Court of Queen's Bench refused to interfere with the verdict of a jury holding the term "frozen snake" to be libelous.

(*d*) As to the third point made in the brief on behalf of plaintiff in error at page 11, complaining that the trial judge did not review the testimony for the benefit of the jury, it is sufficient to say that this objection was not made the matter of any assignment of error, nor was any exception taken to the charge of the court on this score. In *Bird* v. *United States*, 180 U. S. 356, 361, this court said:

> It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal. The numerous decisions to this effect are cited in Wharton on Criminal Law, vol. 3, sec. 3162, 7th ed. The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.

BILL OF EXCEPTIONS.

The bill of exceptions in this case is subject to the same objection made by the Government in the case of *Schaefer* v. *United States*, No. 270, October term, 1919, viz., that it does not comply with paragraph 2 of rule 4 of the Court, since it does not contain only

so much of the evidence as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, being nothing more nor less than a transcript of the stenographer's notes of what occurred at the trial. For that reason either the bill should be disregarded or every possible presumption should be allowed favorable to the propriety of the proceedings at the trial.

CONCLUSION.

The judgment of the court below should be affirmed.

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